

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A
JUDGE: CYNTHIA A. HOLLOWAY
NO.: 00-143

Florida Supreme Court
Case No.: SC00-2226

JUDICIAL QUALIFICATIONS COMMISSION'S MOTION IN OPPOSITION
TO
JUDGE CYNTHIA A. HOLLOWAY'S MOTION TO COMPEL

JUDICIAL QUALIFICATIONS COMMISSION (hereinafter "JQC"), by and through the undersigned Special Counsel, and pursuant to Rules 12 and 21 of the Florida Judicial Qualifications Commission Rules, Rule 9.310 of the Florida Rules of Appellate Procedure and Rule 1.280(b)(3) of the Florida Rules of Civil Procedure, hereby respectfully submits its Motion in opposition to Judge Cynthia A. Holloway's Motion to Compel and requests this Honorable Court grant an Order Denying Judge Holloway's Motion to Compel, and in support thereof states as follows:

1. On October 26, 2000, the Investigative Panel of the JQC filed its Notice of Formal Charges against The Honorable Cynthia A. Holloway, Circuit Judge for the Thirteenth Judicial Circuit, alleging violations of Canons 1, 2, 3, and 5 of the Code of Judicial Conduct.
2. In accordance with Rule 12(b) of the Florida Judicial Qualifications Commission Rules the undersigned Special Counsel filed the names and addresses of nineteen potential witnesses, twelve of whom had been interviewed by the JQC's private investigator.
3. Subsequently, Mr. Scott Tozian, as counsel for Judge Holloway, filed a Motion

to Compel any and all witness interview summaries authored by the JQC's private investigator, Mr. Robert Butler. In addition, Mr. Tozian filed a Motion for Protective Order seeking to halt the scheduled discovery deposition of Judge Holloway pending a decision regarding the requested witness interview summaries. Both Motions were filed with the JQC's Hearing Panel in accordance with Rule 7(b) of the Florida Judicial Qualifications Commissions Rules which sets forth the Hearing Panel's rules.

4. The JQC filed a response, opposing Judge Holloway's Motion to Compel and Motion for Protective order based on the following three propositions: 1) The requested witness summaries are not discoverable "statements" as defined in Rule 1.280(b)(3) of the Florida Rules of Civil Procedure. 2) The requested witness summaries were prepared in anticipation of litigation and as such, are protected by the work product doctrine. An Affidavit of the JQC's investigator, Robert Butler was filed evidencing the work product nature of the requested documents. (See Affidavit of Robert Butler, attached as Exhibit A). 3). Judge Holloway has failed to prove she is entitled to the JQC's work product by failing to state that she is unable without undue hardship to obtain the substantial equivalent of the requested materials by other means.

5. On or about February 20, 2001, the Honorable Judge James Jorgenson, Chairman of the Judicial Qualifications Commission Hearing Panel, entered an Order denying Judge Holloway's Motion to Compel and Motion for Protective Order, and further ordered

that the subject depositions take place on February 26, 27 and 28, 2001, as scheduled.

6. On February 21, 2001, Mr. Tozian filed a second Motion to Compel the witness summaries with this Court, seeking a review of Judge Jorgenson's Order.

7. Judge Holloway's present Motion to Compel discovery is procedurally deficient by virtue of not being included among the list of appealable non-final orders enumerated in Florida Rules of Appellate Procedure 9.130(a) and therefore is not properly before this court and should be denied.

8. Based upon the following argument, the Court should deny the respondent's Motion to Compel the JQC's witness summaries.

ARGUMENT

I. The Hearing Panel's Order denying Judge Holloway's Motion to Compel does not automatically give rise to review before this Court

Rule 21 of the Florida Judicial Qualifications Commission Rules specifically provides that the Florida Rules of Appellate Procedure shall apply for the review of Investigative and Hearing Panel proceedings by the Supreme Court. In the present case, the Respondent's second Motion to Compel filed with the Supreme Court is tantamount to seeking an interlocutory appeal of the Hearing Panel's non-final Order denying her Motion to Compel. As such, the Respondent's Motion should be denied as not being included among the list of appealable non-final orders enumerated in Florida Rule of Appellate Procedure 9.130 (B).

It is widely held that non-final orders for which no enumerated right to appeal is provided under Rule 9.130 are reviewable only in very limited circumstances. *Martin-Johnson, Inc. v. Savage*, 509 So.2d 1097 (Fla. 1987). “Such orders must depart from the essential requirements of law, causing material harm to the petitioner throughout the remainder of the proceedings ...leaving the petitioner with no adequate remedy on appeal.” *Id.*

Judge Holloway has failed to allege that the Hearing Panel’s ruling “departed from the essential requirements of law” in denying her Motion to Compel and that she will suffer “material harm” without the disclosure of the JQC private investigator’s witness summaries. The respondent is easily able to conduct investigative interviews and depositions of each witness listed by the JQC, or in the alternative, has other discovery devices available to gain the desired information. Eighteen of the nineteen potential witnesses listed in the JQC’s 12 (b) response are employed and/or reside in Tampa, Florida. Of the eighteen witnesses listed by the JQC, five work in the Hillsborough County Courthouse, one is Judge Holloway’s husband, and the other is her brother. The remainder of the witnesses are either attorneys or employees associated in one way or another with the Hillsborough County criminal justice system and thus are easily accessible to the respondent. The only exception is Mr. Mark Johnson, the complaining witness, who is currently scheduled for deposition, on February 27th, 2001. Therefore, based on Florida Rule of Appellate Procedure 9.130, respondent’s Motion should be denied as procedurally barred.

II. The Requested Documents Were Prepared In Anticipation of Litigation and are Protected by the Work Product Doctrine

Even if the Court determines that this matter has procedurally been raised in the proper forum, the JQC respectfully submits, in the alternative, that respondent's Motion to Compel the JQC's written interview summaries should be denied as non-discoverable work product.

In furtherance of the inquiry concerning Judge Holloway and in anticipation of the litigation herein, the JQC retained retired Federal Bureau of Investigations Special Agent Robert Butler, by written contract to locate and interview potential witnesses, as well as to document his findings and report to the JQC. (See letter of employment dated, May 16, 2000, attached as Exhibit B). During the course of the investigation, Mr. Butler took non-verbatim, hand written witness interview notes. Using his personal recollection and hand written notes, Mr. Butler subsequently typed-up each witness interview summary which are the subject of respondent's Motion to Compel. The typed summaries were then provided to Mr. Thomas C. MacDonald, Jr., General Counsel for the JQC. (*See*, Sworn Affidavit of Robert Butler attached as Exhibit II.) Mr. Butler's written summaries are precisely the type of document intended for protection under the work product doctrine. The First District Court of Appeals has specifically held that "protection from discovery includes documents prepared in anticipation of litigation by or for a party, or by or for that party's representative..." *Procter & Gamble Co. v. Swilley*, 462 so.2d 1188, 1193 (Fla. 1st DCA 1985).

Furthermore, it is well settled that even though a party may be ordered to provide the

names and addresses of individuals who have furnished statements in anticipation of litigation,(as required by Rule 12(b) “absent rare and exceptional circumstances,” *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 113 (Fla. 1970), the party may not be required to furnish the statements themselves because such statements are work product. *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 S.Ed. 451 (1947); *Miami Transit Co. v. Hurns*, 46 So.2d 390 (Fla. 1950), *Karch, MacKay*, 453 So. 2d 452 (Fla. 4th DCA 1984). In the present case, the respondent has failed to raise any “rare” or “exceptional” circumstances which warrant overruling the work product doctrine.

In addition, even though Mr. Butler’s witness summaries were prepared before litigation formally commenced, the documents are still protected by the work product doctrine as long as there was a substantial possibility that litigation would occur. In *Barnett Bank v. Dottie-G Development*, 645 So.2d 573 (Fla. 2nd DCA 1994), the court held documents are subject to the work product privilege even when litigation is neither pending nor threatened, so long as there is a possibility that a suit might ensue. See *Anshor Nat’l Fin. Services, Inc. v. Smeltz*, 546 So.2d 760, 761 (Fla. 2d DCA 1989).

Interestingly, in paragraph 11 of respondents Motion to Compel, counsel for Judge Holloway states that “the search for truth is best served by compliance with Rule 12 (b) which is to be broadly interpreted in favor of the production of these statements.” Special counsel respectfully disagrees with Mr. Tozian’s view on how the search for truth is best served. Based

on the Motion for Protective Order filed before the Hearing Panel and the Motion to Stay the respondent's deposition before the Florida Supreme Court, it is evident that the respondent wishes to appear for deposition only after she has learned the substance of each and every witness interview conducted by the JQC's private investigator. Common sense would indicate that the truth would best be served if one's adversary is not privy to one's investigative work product. The Third District Court of Appeals similarly held the rationale supporting the work product doctrine is that "one person is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures." *DeBartolo-Aventura, Inc. v. Hernandez*, 638 So. 2d 988, 990 (Fla. 3rd DCA 1994); *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377, 1385 (Fla. 1994).

**III. The Florida Rules of Civil Procedure shall apply in all proceedings
before the Hearing Panel**

Rule 12 (a) of The Florida Judicial Qualifications Commission Rules, specifically provides that "In all proceedings before the Hearing Panel, the Florida Rules of Civil Procedure shall be applicable..." Accordingly, Rule 1.280 (b) (3) of the Florida Rules of Civil Procedure specifically provides that a party may obtain discovery of an opposing party's "documents ... prepared in anticipation of litigation...only upon a showing that the party seeking discovery has need of the material in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." (emphasis added) Opposing counsel

has failed to establish the requisite showing that they are unable without undue hardship to obtain the substantial equivalent information by other means. As previously stated, each and every witness listed by the JQC (with the exception of the complaining witness, Mark Johnson) is either related to Judge Holloway, works with her or is in some way connected to the criminal justice system. By opposing counsel's own admission, they have already interviewed numerous witnesses listed by the JQC and thus have presumably learned the contents of the investigative interviews. (*See* Correspondence authored by Mr. Scott Tozian, dated January 3, 2001 attached as Exhibit C). In so doing, Mr. Tozian has diminished, if not eliminated, any argument in support of the "undue hardship" threshold requirement which must be met before the work product privilege can be overruled.

IV. The JQC's Investigative Witness Summaries Are Not Statements as Defined by Rule 1.280 (b) (3)

Florida Rule of Civil Procedure 1.280 (b)(3) defines a statement for discovery purposes as "a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording or transcription of it that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded." Pursuant to Mr. Butler's affidavit in the present case, the subject witness summaries are not a verbatim account of the witness interviews, but instead are a combination of Mr. Butler's interview notes and personal memory of the interview and thus not discoverable pursuant to Rule

1.280 (b) (3).

V. The JQC Has Fully Complied With Its Obligations Pursuant to Rule 12 (b) of the Judicial Qualifications Commission Rules

Rule 12 (b) of the Judicial Qualifications Commission Rules calls for the disclosure of:

The names and addresses of all witnesses whose testimony the Special Counsel expects to offer at the hearing, together with copies of all written statements and transcripts of testimony of such witnesses in the possession of the counsel or the Investigative Panel which are relevant to the subject matter of the hearing and which have not been previously furnished.

In this case, the JQC has fully complied with the requirements of Rule 12 (b) by providing the names and addresses of potential witnesses, as well as providing a copy of all transcribed statements, the one statement authored a witness, and affidavits.

WHEREFORE, the undersigned Special Counsel, on behalf of the JUDICIAL QUALIFICATIONS COMMISSION, hereby files its Motion in Opposition to Judge Cynthia A. Holloway's Motion to Compel, and respectfully asks this Honorable Court to enter and Order denying Judge Holloway's Motion to Compel the JQC investigative reports and witness summaries and order her to appear for deposition in furtherance of this cause.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail to: Honorable Thomas D. Hall, Clerk, Supreme Court of Florida 500 South Duval Street, Tallahassee, Florida 32399-1927; with copies by U.S. Mail and Facsimile to: Scott K.

Tozian, Esquire, SMITH & TOZIAN, P.A., 109 North Brush Street, Suite 150, Tampa, Florida 33602; Michael S. Rywant, Esq. RYWANT, ALVAREZ, JONES, RUSSO & GUYTON, P.A., 109 N. Brush Street, Suite 500; John Beranek, Esquire, AUSLEY & McMULLEN, Washington Square Building, 227 Calhoun Street, Tallahassee, Florida 32302; Honorable James R. Jorgenson, Chair, Hearing Panel, Third District Court of Appeals, 2001 S.W. 117th Avenue, Miami, Florida 33175-1716; and Thomas C. MacDonald, Jr. General Counsel, JQC, COOK & MACDONALD, 100 N. Tampa Street, Suite 2100, Tampa, Florida 33602, this ____ day of February, 2001.

By: _____
Beatrice A. Butchko, Special Counsel,
Judicial Qualifications Commission
KAYE, ROSE & MALTZMAN, LLP
One Biscayne Tower, Suite 2300
2 South Biscayne Boulevard
Miami, Florida 33131
Florida Bar # 0817163
Tel.: (305) 358-6555
Fax.: (305) 374-9077